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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 470

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner*,

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents*.

No. 473

THE UNITED GAS IMPROVEMENT COMPANY, *Petitioner*,
PHILADELPHIA ELECTRIC COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents*.

BRIEF OF SUN OIL COMPANY IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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NOVEMBER 27, 1959

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 269 F. 2d 865 and is printed in Appendix A, pp. A-1—A-8 to the petition for a writ of certiorari of the Public Service

Commission of the State of New York[1] and in Appendix A, pp. 18-25, of the petition for a writ of certiorari of The United Gas Improvement Company and Philadelphia Electric Company.[2] The opinion, the dissenting opinion and the order of the Federal Power Commission of September 4, 1958, issuing certificates of public convenience and necessity, affirmed by the Court of Appeals, are reported at 20 FPC 264 (R. 481-556). The Commission's order denying applications for rehearing is reported at 20 FPC 571 (R. 602-610).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered August 4, 1959 (PSC Pet., App. A, p. A-9; UGI Pet., App. A, pp. 26-27). The petition of the Public Service Commission of New York was filed on October 9, 1959. The petition of The United Gas Improvement Company (UGI) and Philadelphia Electric Company (Philadelphia Electric) was filed on October 14, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), 15 U.S.C. § 717r(b).

QUESTION PRESENTED

Whether the decision and judgment of the United States Court of Appeals for the Third Circuit affirming an order of the Federal Power Commission issuing certificates of public convenience and necessity without price conditions for the sale of natural gas are in accord with the requirements of the Natural Gas Act?

[1] Referred to hereinafter as "PSC Pet."

[2] Referred to hereinafter as "UGI Pet."

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. §§ 717-717w, are set forth in Appendix B of the Petition of UGI and Philadelphia Electric (App. B, pp. 28-34).

STATEMENT

Sun Oil Company (Sun) was granted two of the thirty-eight certificates of public convenience and necessity issued by the Federal Power Commission's order of September 4, 1958. Sun was an Intervenor-Respondent in the proceedings before the United States Court of Appeals for the Third Circuit, and is named as a Respondent in each of the petitions for a writ of certiorari in Nos. 459 and 473.

Sun does not believe that the issue raised by petitioners requires a counter-statement of the case, although Sun does not agree with many of the conclusions and inferences of the petitioners as set forth in the statements in the petitions. The *only* issue before the Court below was whether it was "an abuse of discretion for the Commission to grant these certificates without conditioning them as to price" (269 F. 2d at 867). In considering the decision of the Court below, however, it is appropriate, we believe, to draw to this Honorable Court's attention a finding from the Commission's order of September 4, 1958 which set forth a general description of the nature of the sales and facilities certificated, some of the factors the Commission considered in determining that producer certificates should be issued without price conditions and the method used in weighing the various factors considered by the Commission:

"* * * A whole expansion program, the largest proposed by Transco since the pipeline commenced operations, is involved in these proceedings—a program of which the distributing companies are the chief beneficiaries. The record shows the urgent need for the supplies of gas this program would make available to meet Transco's resale gas system requirements commencing with the coming winter. Transco states that to limit it to paying 17 cents for gas would prevent the company's acquiring any new gas, would prevent its further expansion and would remove hope of meeting the increased demands of its customers and their consumers for natural gas. Without this gas, Transco will experience a peak day deficiency next winter of 117,000 Mcf in meeting such requirements which will increase to 171,000 Mcf by 1961. Without these supplies, most likely these customers would at best find it necessary to purchase gas at higher prices elsewhere. In our judgment, a consideration of all the factors giving to each its appropriate weight can lead only to the conclusion that public convenience and necessity requires the certification of the producer sales at the initial prices proposed, a conclusion further fortified by the additional considerations discussed in connection with the parties' exceptions, *infra*, pp. 273-274." (20 FPC 264, 271-2)

ARGUMENT

The Court below reviewed the Commission's order of September 4, 1958, and found the Commission had considered all necessary factors and that the Commission's ultimate conclusion was not unreasonable (269 F. 2d at 869). Additionally, the Court below after review found that the Commission's order met the requirements of this Court's decision in *The Atlantic Refining Co. v. Public Service Commission of the State of New York*, 360 U.S. 378 (hereinafter re

ferred to as the *Catco* decision). (269 F. 2d at 867-869). In essence, as will be demonstrated hereinafter, petitioners are asking this Court again to weigh the factors considered by the Commission and the Court below and hold that the Commission's conclusion is unreasonable.

Initially it seems appropriate to point out that the Court below noted that "the factual background is wide" although the subject litigated is a narrow one (269 F. 2d at 867). Thus it appears that the Court below considered it necessary to discuss in detail only the factors specifically put in issue by the petitioners before that Court and the matters specifically referred to in this Court's *Catco* decision, namely, initial price and need for the certificated sales and facilities.

The Court below, after referring to this Court's *Catco* decision, stated that it "proceed[ed] in this case, therefore, with the text of the Supreme Court opinion [in *Catco*] before us" (269 F. 2d at 867). As to the requirements of the *Catco* decision, the Court below noted first that in the *Catco* decision this Court pointed out a lack of need for the gas supply involved in that proceeding. As to need in this proceeding the Court found "That there is a large and immediate need for more gas in the territory served by Transco [which] was fully developed in the testimony and made the subject of findings by the Commission." (269 F. 2d at 868).

The Court below, then pointed out that this Court in its *Catco* decision "emphasizes strongly that attention must be given the price factor", and that the Court below must consider "whether the attention given to the subject of price to be paid for the gas

was sufficient" and whether the Commission's conclusion with respect thereto is reasonable. The Court concluded, after a review of the evidence and findings, that the necessary elements have been considered and that the conclusion reached is not unreasonable (269 F. 2d at 868, 869). Additionally, the Court noted that this Court stated in *Catco* that " 'the Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under either § 4 or § 5.' 360 U.S. at page 390, 79 S. Ct. at page 1254. It did require 'careful scrutiny and responsible reaction to initial price proposals of producers under § 7.' 360 U.S. at page 391, 79 S. Ct. at page 1255. It also recognized that § 7 requires the Commission to 'evaluate all factors bearing on the public interest.' Ibid." (269 F. 2d at 869). The Court below also concluded that the Commission had considered the necessary elements and that the conclusions reached by the Commission were not unreasonable (269 F. 2d at 869).

It is also apparent from the Commission's decision that it recognized "price" as a central issue in the case (20 FPC at 273). The Commission's decision also shows conclusively that the Commission carefully scrutinized the initial price, reflected and considered the results of granting the certificates without price conditions, and after weighing all factors against such results, concluded the certificates should be granted without price conditions (20 FPC 264, 270-274). As already stated, the Court below found the Commission had considered "the necessary elements" and reached a conclusion with respect thereto that was not unreasonable; and, in addition, the Court below reviewed this proceeding with this Court's *Catco* decision before it and determined the order should be affirmed. Under

these circumstances, there clearly was no basis or need for the Court below, or is there a basis or need for this Honorable Court, to remand the proceeding to the Commission for reappraisal under this Court's *Catco* decision as Petitioners, UGI and Philadelphia Electric, contend (UGI Pet. pp. 14-17).

Petitioners, UGI and Philadelphia Electric, argue without justification, that this Court's *Catco* decision requires producers to "justify" their prices (UGI Pet. pp. 8-13). Exactly what "price justification" encompasses these petitioners do not make clear. They admit the term does not require a full-scale producer rate determination, but state "price justification" contemplates a "factual showing that the producer's asking price reflects its actual economic needs." Petitioners cite as their authority for this alleged requirement Footnote 10, R. 419, of the Presiding Examiner's decision issued June 17, 1958. The Presiding Examiner there uses the term "economic status," as the relationship between "income in excess of cost," and "profit" to the seller. Obviously these petitioners are still contending that producers must make a factual showing that the prices are "just and reasonable," the criterion for determining rates under §§ 4 and 5 of the Natural Gas Act which this Honorable Court held is inapplicable in its *Catco* decision.

In contending that the Court below "apparently concluded" the factors of "need," "agreement to pay market prices," "arms-length bargaining," etc. can be substituted for the justification of initial rates, petitioners misconstrue the decision of the Court below (UGI Pet. pp. 9-11, See PSC Pet. pp. 13-15). As already set forth, petitioners have misconstrued this Court's *Catco* decision as to the showing required with

respect to initial prices. However, neither the Court below nor the Commission used need or other factors in scrutinizing price proposals and reflecting the results thereof. Such factors as need, however, were weighed and balanced by the Commission against the results of the price proposals and the Court concluded that the Commission's final result from the weighing and balancing process is not unreasonable (269 F. 2d at 869; 20 FPC at 272). The arguments petitioners here make as to alleged harm that will result from granting the certificates without price conditions were also made to the Commission which weighed them in connection with the public benefit (20 FPC at 273-274). Petitioners again made these arguments to the Court below, and the Court concluded after a review of the evidence, including the evidence on the effect of granting the certificates without price conditions, that the Commission's conclusion was not unreasonable (269 F. 2d at 867, 868-9).

Petitioners' contention that the scope of the Commission's authority to issue certificates with price conditions becomes questionable under the Court of Appeals' decision is without merit. The Court noted specifically that it had said in the *Signal* case[3] that "the Commission could make its certificate conditioned upon a price limitation * * *" (269 F. 2d at 867). However, the Court below noted that it did not say in the *Signal* case that the Commission must issue a certificate with price conditions (269 F. 2d at 867). This Court in its *Catco* decision also pointed to the authority of the Commission under § 7(e) to condition

[3] *Signal Oil & Gas Co.* v. *Federal Power Commission*, 3rd Cir., 1956, 238 F. 2d 771 *certiorari* denied 1957, 353 U.S. 923, 77 S. Ct. 681, 1 L. Ed. 2d. 720.

certificates and stated that the Commission "might attach" conditions it believes necessary where "the proposed price is not in keeping with the public interest * * *" (360 U. S. at 391). Thus, the decision below does not in any way raise questions as to the scope of the Commission's authority to issue certificates conditioned as to price. Here, the price proposal was in keeping with the public interest.

The comparisons presented by Public Service Commission of New York with respect to proposed prices and other factors in the *Catco* case and in this proceeding do not, as that petitioner alleges, show a conflict between the Court's decision below and this Court's *Catco* decision. (PSC Pet. pp. 12-13). This Court did not conclude or decide that the initial prices in that case required the Commission to condition the certificates as to price. In effect, we believe that in *Catco* this Court held that there was insufficient evidence in the record to show that the Commission had carefully scrutinized the prices or that it had reflected a responsible reaction to the price proposals and that, as a result, it had failed to take into consideration and weigh all factors in reaching a proper determination with regard to price conditions. As we have shown, those deficiencies do not exist in this proceeding.

Other contentions made by petitioners, we respectfully submit, are also without merit. Our discussion above of specific contentions, we respectfully submit, shows that in essence petitioners are *only* requesting this Honorable Court to weigh the factors the Commission considered in reaching its result and which the Court of Appeals found was not unreasonable. Clearly this is not an issue which merits this Court issuing a writ of certiorari.

CONCLUSION

For all the foregoing reasons we respectfully request the petitions be denied.

Respectfully submitted,

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NOVEMBER 27, 1959